

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
MACQUARIE GROUP LIMITED LUNCHTIME EVENT
“BUTTERED PARSNIPS AND A DAMP SQUIB”
WEDNESDAY 6 MAY 2015*

1. Good afternoon everyone and thank you Michael for asking me to speak today.
2. In organising this event, Michael suggested that I speak to you all about access to justice and contingency fees. Now, those topics are all very well and interesting in their own way, but I fear they hardly make for a riveting lunch time discussion. On hearing the suggestion, I confess I had a strong urge to exercise a degree of judicial licence, as judges are wont to do, and talk about something completely different. I thought an eminently more suitable topic would be: buttered parsnips and damp squibs.
3. Splitting my time equally, such a topic would give me full rein to first discuss my top ten recipes for buttered, fried and herbed parsnips. I figured at a lunch time event this would be a guaranteed crowd pleaser. I could then move on to speak about damp squibs, or more specifically the “famous squib case” from 1773.¹ In a nutshell, that case concerned a crowded market in Somerset, too much gingerbread, and a squib, which regrettably, was not damp at all and thrown from stall to stall, much like a hot potato.
4. Despite my temptation to turn today’s lunch time event into a combined cooking class and legal history tutorial, I do realise that there may be some more serious folk in the room. It is *possible*, not to say probable, that not everyone attended today to hear my take on how to make paprika and parsnip fries.² It is fortunate therefore, that the subject of buttered parsnips and damp squibs neatly segues into a discussion both of access to justice and contingency fees.
5. By buttered parsnips I am, of course, referring to the wise idiom that is pertinent to the idea of access to justice. Namely false words butter no parsnips; and by damp squibs I am, somewhat cryptically, alluding to how the introduction of contingency fees in the UK is perceived to have panned out. Today I will address each of these in turn.

*I express my thanks to my Research Director, Madeline Hall, for her assistance in the preparation of this address.

¹ *Scott, an infant, by his next friend v Shepherd, an infant, by guardian* (1773) 2 Blackstone W 892; 96 ER 525.

² Spiegel, ‘Parsnip Recipes That Won’t Weird You Out’ The Huffington Post, 3 July 2013.

6. First up, the parsnips and access to justice. Access to justice has been a topical subject of late, no doubt due to the release at the end of last year of the Productivity Commission's Report into access to justice.³ I had occasion to comment on the Commission's Report at the Opening of Law Term Dinner back in February.⁴
7. As I stated then, a basic note of concern I have with the Report, is its underlying premise that the courts, and implicitly justice obtained through the courts, provide merely positive spill overs and are not in themselves a public good. It may be that on this aspect the Commission did not quite mean what it said. In a more recent lecture Commissioner Dr Mundy, denied that that formed part of the Commission's thesis, notwithstanding the express words in the report.⁵
8. Be that as it may, I have no doubt that everyone here can argue about the economic definitions of a public good for an unhealthy period of time. I will not attempt to compete with you in that.
9. The fundamental point I stand by however, is that the courts, through discreet determinations of individual cases, are not simply serving the individual parties. In each and every instance they are providing a public service. The very act of making the decision beneficially affects society. The benefit may be described as broadly as providing certainty as to how people must interrelate in society. Its impact could be described more specifically. For instance, by providing a transparent system in which rights and obligations are defined, regulators are assisted in their own socially beneficial goals. I consider it misleading to call this beneficial effect a spill over, as if it were an unintended by-product of the judicial system. To the contrary, it is in fact a core function.
10. Call me old fashioned, but I think this beneficial effect, because it is so fundamental, is in fact unquantifiable. In the hundredth anniversary of the general theory of relativity, I know such a statement is in danger of being disregarded. For many, "unquantifiable" is synonymous with of no "real" value or, worse still, of no value at all.
11. However, the notion that the courts, and the rule of law which they engineer, promote societal and, in particular, economic benefits, may be derived from

³ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No. 72, 5 September 2014) (the Report).

⁴ Bathurst, 'Reformulating Reform: Courts and the Public Good' (Speech delivered at the Opening of Law Term Address, Sydney, 4 February 2015).

⁵ Compare Mundy, "An economist and the lawyer went to lunch...some reflections on the Productivity Commission's Access to Civil Justice Inquiry" (2015) *ACJI Public Lectures* Book 4 http://www.civiljustice.info/acji_lectures/4, 6 and the Report, 539.

various factors. These include common sense, practical assumptions, logic, and to some extent, empirical studies.⁶

12. It certainly is an idea that has been around for a long time. For instance, in the 15th century Henry the sixth's chancellor asserted that medieval England's prosperity was traceable to the quality of English legal institutions.⁷ More recently, in a 2012 US survey, 70% of general counsels and litigators said the state's litigation environment was likely to affect an important business decision at their company, such as where to locate or do business.⁸ In the last fiscal year, the World Bank spent \$408 million on rule of law initiatives throughout the world. That is undoubtedly a testament to its belief of the benefit it provides for stimulating economic and societal development.⁹ There is also an increasing number of studies attempting to quantify the adverse economic impact caused by the poor funding of a judicial system.¹⁰
13. I believe that if the intangible, yet significant, benefit the judicial system provides to society is acknowledged, beyond a mere spill over, the importance and appropriate weight to be placed on access to justice will naturally shift into focus. I say "appropriate weight" because there is the bitter irony that, more often than not, calls for greater access to justice are simultaneously accompanied with complaints of a clogged judicial system. These issues, of accessing justice and encouraging an unduly litigious society, are not the flip sides of the same coin but they are related and clearly, some sort of balance needs to be struck. The degree of access class-action-plaintiffs should have to a regulator's investigatory files is a pertinent example.¹¹ As is the extent our judicial system should be supported by the use of alternative dispute or compensatory schemes, whether that is in the motor vehicle industry or financial services space.
14. However, as I have said, fine words butter no parsnips. The idea of achieving the optimal access to justice will be not achieved through a lavish supply of words. I could talk about access to justice for as long as it takes to read the *Corporations*

⁶ Greene, 'Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States' (2008) 86 *Denver University Law Review* 1, 53.

⁷ Messick 'Judicial Reform and Economic Development: A Survey of the issues' (1999) 14 *The World Bank Research Observer* 117, 121.

⁸ E Magnuson, S Puiszis, L Agrimonti, N Frank, *The Economics of Justice* (DRI, 2014) 12.

⁹ World Bank, *Annual Report 2014* (24 April 2015) The World Bank https://openknowledge.worldbank.org/bitstream/handle/10986/20093/WB%20Annual%20Report%2014_EN.pdf?sequence=13, 57.

¹⁰ Persall, Shippen, Weinstein, 'Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation' ERS Group Micronomics (March 2012). See also Calamita, 'The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions' and other papers in Jowell, Thomas and Smit (eds), *The Rule of Law Symposium 2014* (Singapore Academy of Law, 2015).

¹¹ Recently discussed in Eastwood, 'Piggy-backing off files to take class actions', *The Australian Financial Review* (Sydney, 17 April 2015).

Act.¹² At the end of the day however, words of commitment must be converted into action.

15. This brings me to contingency fees, which have for a long time, and more recently in the Commission's Report, been touted as one step of action which could be implemented in New South Wales to achieve greater access to justice.¹³
16. At first, I should clarify what I am referring to by contingency fees. As you no doubt know, already in Australia one type of contingency fee, conditional billing, is allowed. Conditional billing is more commonly known as the "no win no fee" style of contingency fee. According to this cost structure, fees are only payable if the client wins. The fees are calculated based on cost, plus an additional or "uplift" fee, that is either separate or built into the legal fees.¹⁴ This compensates the lawyers for the risk of not succeeding and the delay in receiving payment for their costs. The Report's recommendation however was in reference to what I shall call damage-based-billing contingency fees. This again entails fees only being payable if the client wins. However, the fees are calculated as a percentage of the sum recovered, not actual cost.
17. Damage-based-billing has two unique features, compared to conditional billing and indeed other non-contingency based cost structures. They are, proportionality and certainty. Damage-based-billing introduces an element of proportionality into the cost of litigation, far more directly than any other cost structure. Now, while I may not be in favour of "user pay" notions towards the judicial system, I should clarify that I find nothing inherently wrong with a cost structure which focuses litigants' minds on proportionality. After all, proportionality is an explicit consideration when determining whether legal costs are fair and reasonable as per the *Legal Profession Uniform Law*.¹⁵ As for certainty, I think there is no dispute that that is a desirable trait for legal cost structures to have. Of course a downside, peculiar to damage-based-billing, is the fact that claims smaller in value will be less attractive to fund, regardless of their legal merit.
18. You will be relieved to hear that I don't intend to embark on an academic analysis of all the advantages and disadvantages of damage-based-billing today. I'll perhaps content myself to say that it is important when criticising new cost structures, to not forget the disadvantages inherent in existing structures, such as

¹² (2001) Cth.

¹³ Arguably, damage-based-billing existed indirectly in NSW in the limited area of conditional cost agreements in claims for damages prior to the *Legal Profession Uniform Law (NSW)* (2014) NSW. Under the old *Legal Profession Act 2004* NSW s 338, uplift fees were not allowed for such claims so legal fees were capped at a fixed figure or 20% of the amount recovered.

¹⁴ Since the introduction of the *Legal Profession Uniform Law (NSW)* (2014) NSW, s 182 separate additional fees may now be charged for claims for damages, although the cap, of 25%, has remained the same as it was before for other types of claims.

¹⁵ Section 172 *Legal Profession Uniform Law (NSW)* (2014) NSW.

the billable hour.¹⁶ For instance damage-based-billing may run the risk, inherent in all contingency based costs structures, of incentivising lawyers to encourage their client to settle too early. However, equally and conversely, the billable hour runs the risk of incentivising lawyers to encourage their client to settle too late (if at all).

19. Leaving the pros and cons to one side, I'd rather briefly take a look at how the introduction of damage-based-billing in the United Kingdom in 2013 has gone.¹⁷ I say briefly, because as I alluded to earlier, the reform has been less than popular. Some have described it as "a damp squib". Other commentators have also likened the agreements to a yeti, in that they "are believed to exist in practice but hardly any sightings have been made".¹⁸
20. Why has the fee reform been unsuccessful? Without descending to the minutia of the provisions, I think there may have been two problems.¹⁹
21. The first potential problem to strike me is how a damage-based-billing agreement is defined in the reform legislation. In the UK, the agreements have been made "all or nothing", in the sense that a failure to adhere to the detailed compliance provisions, in *any* respect, renders the agreement totally unenforceable.²⁰ Moreover, claims at common law that simply seek payment for work done, also appear unavailable.²¹ Thus, lawyers face a real risk of not getting paid anything, if anything goes wrong.
22. The dangers of such a set up were made clear when *conditional* billing in the UK was similarly made "all or nothing" in 2000. This sparked fierce satellite litigation, where every technical point was made to avoid the liability of a conditional billing agreement altogether.²² The period of litigation was considered so intense it became known as the "costs war" and sparked wholesale retraction of the regulations in 2005.²³

¹⁶ See Kritzer, 'Fee Regimes and the Cost of Civil Justice' (2009) 28(3) *Civil Justice Quarterly* 344 and M Cook, 'Hourly rates and fixed costs' (2013) 32(2) *Civil Justice Quarterly* 167.

¹⁷ Section 45 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), amending s 58AA of *Courts and Legal Services Act 1990* (UK).

¹⁸ Peysner, 'Impact of the Jackson reforms: Some emerging Themes' (Report prepared for the Civil Justice Council Cost Forum, 21 March 2014) (Peysner), 10.

¹⁹ For a more comprehensive and detailed assessment of issues arising from the reform see R Mulheron, 'The Damages-Based Agreements Regulations 2013: Some conundrums in the "Brave New World" of funding' (2013) 32(2) *Civil Justice Quarterly* 241 (Mulheron).

²⁰ *Courts and Legal Services Act 1990* (UK), s 58AA(2).

²¹ Mulheron, 250.

²² Lord Jackson, *Review of Civil Litigation Costs: Preliminary Report*, (May 2009) (Preliminary Report), 29. It is interesting that the same report which recommended the introduction of damage-based-billing also identified the cause for the costs war as being the "all or nothing" structure of conditional billing.

²³ Most often cited is *Callery v Gray* [2001] EWCA Civ 1117; [2001] 1 WLR 2112 and *Hollins v Russell* [2002] EWCA Civ 718; [2003] 1 WLR 2487.

23. Fortunately, New South Wales has avoided costs wars over conditional billing because an “all or nothing” structure does not exist. An agreement may be held unenforceable if the provisions, which incidentally are less detailed, are not complied with. However, in such an event, the lawyer is still able to recover the costs assessed as fair and reasonable. Although, such an assessment cannot exceed the amount the lawyer would be entitled to, under the cost agreement.²⁴
24. Despite such alternative structures being available, the UK reforms adopted the same “all or nothing” approach to damage-based billing. Interestingly, the explanatory memorandum introducing the reforms acknowledged the prospect of satellite litigation.²⁵
25. It is understandable, given the cost wars over conditional billing, that UK lawyers are now fearful to touch the similarly structured damage-based-billing and are speaking of costs war number two.²⁶ After all, a fee structure that is unknown, bristling with litigation and with the potential to leave a lawyer with absolutely nothing, is unlikely to attract an inherently conservative bunch.²⁷ All the more so, when practitioners were given less than three months from the date of enactment before the damage-based-billing reforms were operational.²⁸
26. It appears to me that the UK’s “all or nothing” structure, has the potential to erode the proportionality purpose of having damage-based-billing in the first place. One of the unique draw cards of damage-based-billing would then be lost in the implementation process.
27. The second potential problem which strikes me with the UK reforms, is how damage-based-billing has been integrated into the principle of recovering reasonable costs from the losing party. Broadly speaking there are two possible models, the Ontario model (which the UK has adopted) and the Success Fee model. Assume a billing percentage of 25% is adopted. Under the Ontario model, the lawyer will receive their recoverable costs from the other side (provided they do not exceed 25% of the award), plus anything more from the client’s award to reach the 25%. The client will receive the difference between 25% of the award on the one hand and the sum total of the award and recoverable costs on the other.

²⁴ Sections 178 and 185 *Legal Profession Uniform Law (NSW)* (2014) NSW.

²⁵ Explanatory Memorandum, Damages-Based Agreements Regulations 2013 (Explanatory Memorandum), 7.5.

²⁶ See Ayling, ‘Costs War II: CFAs, DBAs and Enforceability’ (2013) 2 *Journal of Personal Injury Law* 127.

²⁷ A 2014 study has indicated that conservative tendencies within the profession are a factor in the limited uptake of damage-based-billing agreements. For details of this and other reasons as to the slow uptake in damage-based-billing see Peysner, 10.

²⁸ Mulheron, 241.

28. In contrast, under the Success Fee model, the lawyer receives 25% of the award *and* any recoverable costs. The client receives 75% of the award, plain and simple.
29. Incidentally, there is also a third model, which is a variant of the Ontario model, where recoverable costs are considered to be part of the definition of what is “awarded”. I would call this the All Inclusive model. Under it, the lawyer receives 25% of the sum total, of the award and any recoverable costs. On the face of the UK Regulations, it is actually not clear whether the rules require the Ontario or All Inclusive model.²⁹
30. This uncertainty between models is, of course, problematic but will no doubt be resolved through the courts shortly. Of greater concern is the fact that the models themselves are uncertain. Both the Ontario and All Inclusive models lack the certainty which the Success Fee model guarantees. Unless reasonable costs are fixed, models which include costs-to-be-assessed in the calculation of a percentage fee, will always leave a lawyer unable to categorically tell their client how much the matter will cost in dollars and cents. Thus, under such models, damage-based-billing runs the risk of losing its other unique draw card-certainty.
31. It does not necessarily follow from all this that only the Success Fee model should be adopted, or “all or nothing” structures are doomed to fail. However, I think it does show that if any reform is to be made to contingency fees it is important that consideration is had to the manner in which the reform is implemented to ensure the main reason the reform is being introduced in the first place is not undercut.
32. Turning finally back to where contingency fees and access to justice meet. I think it should be acknowledged that contingency fees’, whether in the form of conditional or damage-based billing, have a limited ability to increase access to justice. The use of conditional billing in class actions is a case in point. Since “limited groups”³⁰ have been allowed, class actions are increasingly being run where the group is limited to only those who have entered into a damage-based-billing litigation funding agreement prior to the commencement of proceedings.³¹ Such “[n]arrower class definitions reduce access to justice for those who are not included in the class and increase the likelihood of other proceedings being brought in relation to the same facts.”³² This is not good for plaintiffs or defendants and, as with damage-based-billing in the UK, has the complete opposite effect of that intended, which was to increase access to justice.

²⁹ Mulheron, 246.

³⁰ Since their legality was confirmed in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200; (2007) 164 FCR 275.

³¹ Study by Morabito detailed in Hoffmann-Ekstein, ‘Funding open classes through common fund applications’ (2013) 87 *Australian Law Journal* 331 (Hoffmann-Ekstein), 334.

³² Hoffmann-Ekstein, 334.

33. It is understandable that with the growing use of limited groups there has been increasing talk in Australia of allowing different funding arrangements for class actions, such as the common fund approach used in the US.³³ Of course the “significant difference between the common fund and the contingency fee, is that the latter is a private arrangement while the former is overseen by the courts as part of their regulatory role.”³⁴ Such regulation may not strictly speaking be all that needed, given how many Australian class actions have settled and the requirement that all settlements be subject to court approval anyway. No doubt, however, there are some in this room who are of the view that a little more regulation in this area wouldn’t hurt.

³³ Legg, ‘Contingency Fees-Antidote or poison for Australian civil justice?’ (2015) 39 *Australian Bar Review* 244 (Legg), 271.

³⁴ Legg, 268.